

Maureen C. VanderMay, WSBA No. 16742
The VanderMay Law Firm PC
2021 S. Jones Blvd.
Las Vegas, Nevada 89146
(702) 538-9300

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,

Plaintiff,

v.

RYAN LAMBERSON,

Defendant.

Case No.: 2:13-CV-00395-TOR

DECLARATION OF COUNSEL
IN SUPPORT OF REPLY
MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTIONS
IN RESPONSE TO DEFENDANT'S
SECOND AMENDED ANSWER
AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S FIRST
AMENDED COMPLAINT; AND
COUNTERCLAIM

I, Maureen C. VanderMay, submit the following declaration:

1. I am counsel of record for Plaintiff in the above-entitled matter.
 2. I make this declaration in support of Plaintiff's Reply Memorandum in Support of Plaintiff's Motions in Response to Defendant's Second Amended Answer and Affirmative Defenses to Plaintiff's First Amended Complaint; and Counterclaim.
- My statements are true to the best of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

DECLARATION OF COUNSEL IN SUPPORT
OF REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTIONS IN RESPONSE TO
DEFENDANT'S SECOND AMENDED ANSWER – Page 1

1 3. Defendant's claim that Plaintiff has refused to produce any explanation of
2 its relationship with its investigators, ECF No. 38 at p. 9, is inaccurate. At a
3 discovery conference held in this action, the Court ordered Plaintiff to produce
4 documentation regarding its arrangements with its investigators or, in the event
5 that no such documents exist, to provide a description of these arrangements to
6 Defendant. Promptly after the Court so ruled, I requested that any such documents
7 be provided to me for production to Defendant's counsel. When I was informed
8 that no such documents exist, I prepared a written narrative which describes the
9 subject arrangement. I then circulated my draft narrative to the interested parties
10 to ensure that my characterization was accurate. I also obtained some additional
11 documentation relating to Plaintiff's investigators. Since it took some time to
12 obtain the confirmation necessary to assure the accuracy of my narrative, I
13 apprized Defendant's counsel of the reasons for the delay in forwarding this
14 information. Upon receipt of the requested confirmation, I promptly forwarded
15 both my narrative and the above-referenced additional documentation to
16 Defendant's counsel.

17 In response, Defendant's counsel forwarded a detailed list of follow up
18 questions which consists of approximately three and one half pages. Despite the
19 fact that in my view the material produced to date fully complies with the Court's
20 above-referenced order, I have informed Defendant's counsel that we are
21 preparing additional material regarding these issues in response to his follow up
22 inquiry and that I will forward it promptly upon its completion. I have informed
23 Defendant's counsel and I will tell the Court that Plaintiff has nothing to hide with
24 respect to these issues and that my office has put a lot of time and effort into
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1 addressing these issues and complying with the Court's order.

2 4. Defendant claims that Plaintiff "appears entirely uninterested in discovering
3 the source of the infringement or in stopping it at its source." ECF No. 38 at p. 9.
4 Presumably Defendant makes this assertion based upon Plaintiff's explanation
5 provided through discovery that it cannot identify the original "seeder" of its work.
6 In an email dated March 14, 2014, to Defendant's counsel, I confirmed that
7 Plaintiff has not identified the original seeder of its work and explained the
8 difficulty of much such a determination. I stated in pertinent part as follows:

9 "With respect to why it is almost impossible to identify the initial
10 seeder, it has been explained to me that this person need only appear
11 for a short period of time to make a full copy of the work available.
12 Moreover, even if the initial seeder remained online for a long period
13 of time, he or she is indistinguishable from other participants within
14 the swarm once others have acquired a full copy of the file and begin
15 to seed. By way of analogy, the seeding of a work is akin to the
16 spread of the influenza virus. If 200 people are placed in a room and
17 one of them is infected with the influenza virus, three days hence 50
18 of these people may have the virus. At that point, identifying the
19 originator of the virus is difficult unless you know who that person
20 was initially or if you happened to be present from the very
21 beginning. While there are undoubtedly limits to this analogy, we
22 provide it by way of an explanation as to why the investigators cannot
23 simply go back and identify the seeder so that information may be
24 disclosed in this action."

17 While Defendant's counsel has claimed that Defendant has identified the
18 original seeder of Plaintiff's work, the basis for this claim and its accuracy have
19 yet to be tested.

20 5. Defendant's claim that Plaintiff has demanded that its fact witness be paid
21 to be deposed, ECF No. 38 at p. 9, is false. Although on several occasions I have
22 suggested to Defendant's counsel that we conduct some preliminary discovery
23 regarding issue of the identity of the likely infringer of Plaintiff's copyrighted
24 work before reaching the more costly and complex aspects of discovery,
25

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1 Defendant's counsel has requested that several of the persons identified in
2 Plaintiff's Initial Disclosures and who are based in Europe be made available for
3 deposition in Spokane. Because our research and experience indicate that in the
4 circumstances at issue the moving party would typically pay certain deposition-
5 related expenses, in a letter dated April 3, 2014, I stated as follows to Defendant's
6 counsel:

7 "With respect to depositions of Messrs. Patzer and Macek, can you
8 please advise as to your proposal for covering their travel and related
9 expenses if they appear in Spokane for depositions? Also, as I
10 understand it Mr. Patzer is an outside consultant who will expect to
11 be paid his hourly rate in addition to his travel expenses. As I
12 previously indicated I would do, I have checked to see if these
13 individuals regularly travel to the U.S. for other reasons which might
14 reduce the cost of deposing them in the U.S. I have been told that they
15 do not generally travel here in the ordinary course."

16 Plaintiff has made no demand whatsoever on this issue and, as this letter
17 demonstrates, nor have I. Rather, I simply asked for Defendant's position with
18 respect to various deposition-related expenses.

19 6. Defendant also claims without any factual basis that Plaintiff has no interest
20 in litigating the infringement cases brought by it. ECF No. 38 at p. 9. The Court's
21 docket in both this action and the consolidated action from which this case was
22 severed belie this claim. The consolidated action, *Elf-Man, LLC v. Brown et al.*,
23 Case No.13-cv-0115-TOR (E.D. WA), was commenced against twenty-nine Doe
24 defendants more than a year ago and my firm and our co-counsel have spent a
25 great deal of time litigating that action. As the Court will recall, we responded to
26 multiple motions filed as a result of the subpoenas we issued to various Internet
27 Service Providers. After those motions were resolved, we filed Plaintiff's first
28 amended complaint and effected service upon every defendant that our process

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DECLARATION OF COUNSEL IN SUPPORT
OF REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTIONS IN RESPONSE TO
DEFENDANT'S SECOND AMENDED ANSWER – Page 4

1 server could locate. We dismissed against persons who she could not locate, as
2 well as against several persons with whom we reached settlements. We requested
3 and was granted entry of default against the non-responding Defendants and spent
4 a considerable amount of time responding to motions filed under Fed. R. Civ. P.

5 12. Once the Court issues its scheduling order and the required Rule 26(f)
6 conference is held and initial disclosures exchanged, Plaintiff fully intends to
7 actively engage in discovery in that action.

8 7. In the present case, the Court is well aware of the extensive activity in this
9 action in the months since severance was granted. Indeed, five months after the
10 case was severed, the pleadings are not yet finalized and I am spending an
11 inordinate amount of time addressing issues in this case due to the manner in
12 which Defendant has chosen to proceed. Given the workload generated by this
13 case and particularly in light of Defendant's approach to this litigation, I simply
14 fail to see how Defendant can credibly allege that Plaintiff has no interest in
15 litigating its infringement actions.

16 8. With respect to the issue of standing, as our reply memorandum explains,
17 our research has led us to conclude that Plaintiff (and not its sales agent, Vision
18 Films, Inc.) has standing to proceed with this action under the governing
19 precedent. In the event that the Court concludes that our analysis is incorrect, we
20 are prepared to file motions to either add Vision Films, Inc. as a plaintiff in this
21 action or to substitute Vision Films, Inc. in as the sole Plaintiff in this action.

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26 DECLARATION OF COUNSEL IN SUPPORT
27 OF REPLY MEMORANDUM IN SUPPORT OF
28 PLAINTIFF'S MOTIONS IN RESPONSE TO
DEFENDANT'S SECOND AMENDED ANSWER – Page 5

DATED: April 25, 2014.

s/ Maureen C. VanderMay
Maureen C. VanderMay, WSBA No. 16742
Email: elfmanwa@vandermaylawfirm.com
2021 S Jones Blvd.
Las Vegas, Nevada 89146
(702) 538-9300
Of Attorneys for Plaintiff